such statements are provided by its commercial agent or representative, even when such statements are made with the full knowledge of the U.S. person.

Nature of the requirement. For a boycott-related commercial registration requirement to fall within the coverage of this interpretation it must have the following characteristics:

1. The requirement for information imposed by the boycotting country applies to a national or other subject of the boycotting country qualified under the local laws of that country to function as a commercial representative within that country;

2. The registration requirement relates to the registration of the commercial agent's or representative's authority to sell or distribute goods within the boycotting country acquired from the foreign concern;

3. The requirement is a routine part of the registration process and is not applied selectively based on boycott-related criteria;

4. The requirement applies only to a commercial agent or representative in the boycotting country and does not apply to the foreign concern itself; and

5. The requirement is imposed by the agency of the boycotting country responsible for regulating commercial agencies.

The U.S. person whose agent is complying with the registration requirement continues to be subject to all the terms of the Regulations, and may not provide any prohibited information to the agent for purposes of the agent's compliance with the requirement.

In addition, the authority granted to the commercial agent or representative by the U.S. person must be consistent with standard commercial practices and not involve any grants of authority beyond those incidental to the commercial sales and distributorship responsibilities of the agent.

Because the requirement does not apply to the U.S. person, no reporting obligation under §760.5 of this part would arise.

This interpretation, like all others issued by the Department discussing applications of the antiboycott provisions of the Export Administration Regulations, should be read narrowly. Circumstances that differ in any material way from those discussed in this notice will be considered under the applicable provisions of the Regulations. Persons are particularly advised not to seek to apply this interpretation to circumstances in which U.S. principals seek to use agents to deal with boycott-related or potential blacklisting situations.

[61 FR 12862, Mar. 25, 1996, as amended at 65 FR 34950, June 1, 2000]

SUPPLEMENT NO. 13 TO PART 760—INTERPRETATION

SUMMARY

This interpretation considers boycott-based contractual language dealing with the selection of suppliers and subcontractors. While this language borrows terms from the "unilateral and specific selection" exception contained in §760.3(d), it fails to meet the requirements of that exception. Compliance with the requirements of the language constitutes a violation of the regulatory prohibition of boycott-based refusals to do business.

REGULATORY BACKGROUND

Section 760.2(a) of this part prohibits U.S. persons from refusing or knowingly agreeing to refuse to do business with other persons when such refusal is pursuant to an agreement with, requirement of, or request of a boycotting country. That prohibition does not extend to the performance of management, procurement or other pre-award services, however, notwithstanding knowledge that the ultimate selection may be boycott-based. To be permissible such services: (1) Must be customary for the firm or industry involved and (2) must not exclude others from the transaction or involve other actions based on the boycott. See §760.2(a)(6) of this part, "Refusals to Do Business", and example (xiii).

A specific exception is also made in the Regulations for compliance (and agreements to comply) with a unilateral and specific selection of suppliers or subcontractors by a boycotting country buyer. See §760.3(d) of this part. In supplement No. 1 to part 760, the following form of contractual language was said to fall within that exception for compliance with unilateral and specific selection:

"The Government of the boycotting country (or the First Party), in its exclusive power, reserves its right to make the final unilateral and specific selection of any proposed carriers, insurers, suppliers of services to be performed within the boycotting country, or of specific goods to be furnished in accordance with the terms and conditions of this contract."

The Department noted that the actual steps necessary to comply with any selection made under this agreement would also have to meet the requirements of §760.3(d) to claim the benefit of that exception. In other words, the discretion in selecting would have to be exercised exclusively by the boycotting country customer and the selection would have to be stated in the affirmative, naming a particular supplier. See §760.3(d) (4) and (5) of this part.

ANALYSIS OF ADDITIONAL CONTRACTUAL LANGUAGE

The Office of Antiboycott Compliance has learned of the introduction of a contractual clause into tender documents issued by boycotting country governments. This clause is, in many respects, similar to that dealt with in supplement No. 1 to part 760, but several critical differences exist.

The clause states:

BOYCOTT OF [NAME OF BOYCOTTED COUNTRY]

In connection with the performance of this Agreement, Contractor acknowledges that the import and customs laws and regulations of boycotting country apply to the furnishing and shipment of any products or components thereof to boycotting country. The Contractor specifically acknowledges that the aforementioned import and customs laws and regulations of boycotting country prohibit, among other things, the importation into boycotting country of products or components thereof: (A) Originating in boycotted country; (B) Manufactured, produced and furnish by companies organized under the laws of boycotted country; and (C) Manufactured, produced or furnished by Nationals or Residents of boycotted country.

The Government, in its exclusive power, reserves its right to make the final unilateral and specific selection of any proposed Carriers, Insurers, Suppliers of Services to be performed within boycotting country or of specific goods to be furnished in accordance with the terms and conditions of this Contract.

To assist the Government in exercising its right under the preceding paragraph, Contractor further agrees to provide a complete list of names and addresses of all his Sub-Contractors, Suppliers, Vendors and Consultants and any other suppliers of the service for the project.

The title of this clause makes clear that its provisions are intended to be boycott-related. The first paragraph acknowledges the applicability of certain boycott-related requirements of the boycotting country's laws in language reviewed in part 760, supplement No. 1, Part II.B. and found to constitute a permissible agreement under the exception contained in §760.3(a) of this part for compliance with the import requirements of a boycotting country. The second and third paragraphs together deal with the procedure for selecting subcontractors and suppliers of services and goods and, in the context of the clause as a whole, must be regarded as motivated by boycott considerations and intended to enable the boycotting country government to make boycott-based selections, including the elimination of blacklisted subcontractors and suppliers.

The question is whether the incorporation into these paragraphs of some language from the "unilateral and specific selection" clause approved in supplement No. 1 to part 760 suffices to take the language outside §760.2(a) of this part's prohibition on boycott-based agreements to refuse to do business. While the first sentence of this clause is consistent with the language discussed in supplement No. 1 to part 760, the second sentence significantly alters the effect of this clause. The effect is to draw the contractor into the decision-making process, thereby destroying the unilateral character of the selection by the buyer. By agreeing to submit the names of the suppliers it plans to use, the contractor is agreeing to give the boycotting country buyer, who has retained the right of final selection, the ability to reject, for boycott-related reasons, any supplier the contractor has already chosen. Because the requirement appears in the contractual provision dealing with the boycott, the buyer's rejection of any supplier whose name is given to the buyer pursuant to this provision would be presumed to be boycott-based. By signing the contract, and thereby agreeing to comply with all of its provisions, the contractor must either accept the buyer's rejection of any supplier, which is presumed to be boycott-based because of the context of this provision, or breach the contract.

In these circumstances, the contractor's method of choosing its subcontractors and suppliers, in anticipation of the buyer's boycott-based review, cannot be considered a permissible pre-award service because of the presumed intrusion of boycott-based criteria into the selection process. Thus, assuming all other jurisdictional requirements necessary to establish a violation of part 760 are met, the signing of the contract by the contractor constitutes a violation of §760.2(a) of this part because he is agreeing to refuse to do business for boycott reasons.

The apparent attempt to bring this language within the exception for compliance with unilateral and specific selections is ineffective. The language does not place the discretion to choose suppliers in the hands of the boycotting country buyer but divides this discretion between the buyer and his principal contractor. Knowing that the buyer will not accept a boycotted company as supplier or subcontractor, the contractor is asked to use his discretion in selecting a single supplier or subcontractor for each element of the contract. The boycotting country buyer exercises discretion only through accepting or rejecting the selected supplier or contractor as its boycott policies require. In these circumstances it cannot be said that the buyer is exercising right of unilateral and specific selection which meets the criteria of §760.3(d). For this reason, agreement to the contractual language discussed here would constitute an agreement to refuse to do business with any person rejected by the

buyer and would violate §760.2(a) of this part.

[61 FR 12862, Mar. 25, 1996, as amended at 65 FR 34950, June 1, 2000]

SUPPLEMENT NO. 14 TO PART 760—INTERPRETATION

(a) *Contractual clause concerning import, customs and boycott laws of a boycotting country.* The following language has appeared in tender documents issued by a boycotting country:

"Supplier declares his knowledge of the fact that the import, Customs and boycott laws, rules and regulations of [name of boycotting country] apply in importing to [name of boycotting country]."

"Supplier declares his knowledge of the fact that under these laws, rules and regulations, it is prohibited to import into [name of the boycotting country] any products or parts thereof that originated in [name of boycotted country]; were manufactured, produced or imported by companies formed under the laws of [name of boycotted country]; or were manufactured, produced or imported by nationals or residents of [name of boycotted country]."

Agreeing to the above contractual language is a prohibited agreement to refuse to do business, under §760.2(a) of this part. The first paragraph requires broad acknowledgment of the application of the boycotting country's boycott laws, rules and regulations. Unless this language is qualified to apply only to boycott restrictions with which U.S. persons may comply, agreement to it is prohibited. See §760.2(a) of this part, examples (v) and (vi) under "Agreements to Refuse to Do Business."

The second paragraph does not limit the scope of the boycott restrictions referenced in the first paragraph. It states that the boycott laws include restrictions on goods originating in the boycotted country; manufactured, produced or supplied by companies organized under the laws of the boycotted country; or manufactured, produced or supplied by nationals or residents of the boycotted country. Each of these restrictions is within the exception for compliance with the import requirements of the boycotting country (§760.3(a) of this part). However, the second paragraph's list of restrictions is not exclusive. Since the boycott laws generally include more than what is listed and permissible under the antiboycott law, U.S. persons may not agree to the quoted clause. For example, a country's boycott laws may prohibit imports of goods manufactured by blacklisted firms. Except as provided by §760.3(g) of this part, agreement to and compliance with this boycott restriction would be prohibited under the antiboycott law.

The above contractual language is distinguished from the contract clause determined to be permissible in supplement 1, Part II, A, by its acknowledgment that the boycott requirements of the boycotting country apply. Although the first sentence of the supplement 1 clause does not exclude the possible application of boycott laws, it refers only to the import and customs laws of the boycotting country without mentioning the boycott laws as well. As discussed fully in supplement No. 1 to part 760, compliance with or agreement to the clause quoted there is, therefore, permissible.

The contract clause quoted above, as well as the clause dealt with in supplement No. 1 to part 760, part II, A, is reportable under §760.5(a)(1) of this part.

(b) *Letter of credit terms removing blacklist certificate requirement if specified vessels used.* The following terms frequently appear on letters of credit covering shipment to Iraq:

"Shipment to be effected by Iraqi State Enterprise for Maritime Transport Vessels or by United Arab Shipping Company (SAB) vessels, if available."

"If shipment is effected by any of the above company's [sic] vessels, black list certificate or evidence to that effect is not required."

These terms are not reportable and compliance with them is permissible.

The first sentence, a directive to use Iraqi State Enterprise for Maritime Transport or United Arab Shipping vessels, is neither reportable nor prohibited because it is not considered by the Department to be boycott-related. The apparent reason for the directive is Iraq's preference to have cargo shipped on its own vessels (or, as in the case of United Arab Shipping, on vessels owned by a company in part established and owned by the Iraqi government). Such "cargo preference" requirements, calling for the use of an importing or exporting country's own ships, are common throughout the world and are imposed for non-boycott reasons. (See §760.2(a) of this part, example (vii) AGREEMENTS TO REFUSE TO DO BUSINESS.)

In contrast, if the letter of credit contains a list of vessels or carriers that appears to constitute a boycott-related whitelist, a directive to select a vessel from that list would be both reportable and prohibited. When such a directive appears in conjunction with a term removing the blacklist certificate requirement if these vessels are used, the Department will presume that beneficiaries, banks and any other U.S. person receiving the letter of credit know that there is a boycott-related purpose for the directive.

The second sentence of the letter of credit language quoted above does not, by itself, call for a blacklist certificate and is not therefore, reportable. If a term elsewhere on the letter of credit imposes a blacklist certificate requirement, then that other term would be reportable.